Supreme Court, U.S.
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No. 04- 04-726

IN THE

Supreme Court of the United States

MOYE, O'BRIEN, O'ROURKE, HOGAN & PICKERT,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents three questions for the Court's consideration.

1. Whether a Government agency may withhold documents responsive to a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, request when the documents have only a reasonable nexus to a claimed deliberative process?

2. Whether the Eleventh Circuit erred when it applied a "process" based analysis rather than the document specific analysis previously required by this Court's deliberative process privilege decisions?

3. Whether the Eleventh Circuit erred when it reversed the district court based on a deliberative process that the Respondent neither asserted nor proved at trial?

CORPORATE DISCLOSURE STATEMENT

The Petitioner was a partnership.

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OPINIONS AND ORDERS ENTERED BELOW

Two orders of the United States District Court for the Middle District of Florida and two opinions of the United States Court of Appeals for the Eleventh Circuit are at issue in this petition.

The first district court order, dated August 18, 2003, is unreported. App., *infra*, 44a. The second district court order, dated October 22, 2003, is also unreported. App., *infra*, 31a.

The first opinion of the United States Court of Appeals for the Eleventh Circuit, dated July 14, 2004, which reversed the district court's August 18, 2003 order through a novel, overly broad interpretation of the deliberative process privilege, is reported at *Moye, O'Brien, O'Rourke, Hogan & Pickert v. National Railroad Passenger Corporation*, 376 F.3d 1270 (11th Cir. 2004) ("*Moye I*"). App., *infra*, 9a. The Eleventh Circuit's order denying the subsequent Petition for Rehearing *En Banc* is unreported. App., *infra*, 75a.

The second opinion of the United States Court of Appeals for the Eleventh Circuit, dated September 3, 2004, which reviewed the district court's October 22, 2003 order and applied *Moye I*'s erroneous interpretation of the deliberative process privilege, is unreported ("*Moye II*"). App., *infra*, 1a. No rehearing was sought for *Moye II*.

JURISDICTION

Moye I, App., *infra*, 9a, was filed July 14, 2004. The subsequent Petition for Rehearing *En Banc* was denied September 14, 2004. App., *infra*, 75a. *Moye II* was filed September 3, 2004. App., *infra*, 1a. No rehearing was sought for *Moye II*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTES INVOLVED

The Freedom of Information Act ("FOIA"), provides, in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees, (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3)(A).

The FOIA also provides, in part:

> (b) This section does not apply to matters that are —
>
> * * *
>
> (5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . .

5 U.S.C. § 552(b)(5).

STATEMENT OF THE CASE

On May 1, 2001, the petitioner, Moye, O'Brien, O'Rourke, Hogan & Pickert ("Moye O'Brien"), sent a FOIA request to the respondent, National Railroad Passenger Corporation ("Amtrak"). Moye O'Brien's requests sought records associated with routine financial audits performed by Amtrak or Amtrak's Office of Inspector General (the "audit work papers"). The requests also sought records relating to anchor bolts that were used in the construction of a system that electrified portions of Amtrak's rail lines (the "anchor bolt documents").

Amtrak declined to produce certain responsive records and Moye O'Brien sued Amtrak, pursuant to 5 U.S.C. § 552(a)(4)(B), to compel disclosure. Amtrak answered and reasserted its claim that the audit work papers and the anchor bolt documents were exempted from disclosure by, *inter alia*, the deliberative process privilege component of FOIA Exemption (b)(5).

The parties filed cross-motions for summary judgment regarding, *inter alia*, Moye O'Brien's entitlement to the requested documents and Amtrak's assertion of the deliberative process privilege. At summary judgment, the district court[1] believed that Moye O'Brien was entitled to the requested records because Amtrak failed to prove the applicability of its asserted privileges. Nevertheless, in an effort to give Amtrak a second chance, the district court denied the cross-motions for summary judgment and held bench trials to consider anew Moye O'Brien's entitlement to the requested documents and Amtrak's privilege claims. The district court tried the question of Moye O'Brien's entitlement to the audit working papers separately from the question of Moye O'Brien's entitlement to the documents relating to anchor bolts.

"Moye I" — Exemption (b)(5) and the Audit Work Papers

On July 28, 2003, the district court held a bench trial to determine whether the deliberative process privilege (Exemption (b)(5)), *inter alia*, exempted the audit work papers from disclosure under the FOIA. In its post-trial order dated August 18, 2003, the district court found in favor of Moye O'Brien concluding that "Amtrak failed to sustain its burden of proving that the withheld working papers are within the deliberative process privilege." App., *infra*, at 71a.

Amtrak appealed the district court's August 18, 2003 order to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit, in an opinion dated July 14, 2004, reversed the district court and remanded the case.

1. The parties consented to trial before a magistrate judge. The magistrate judge is hereinafter referred to as the "district court."

App., *infra*, at 30a. *Moye I* included three significant legal errors. First, the *Moye I* court erred when it concluded that the deliberative process privilege protects documents that have only a "reasonable nexus" to a claimed deliberative process. In so holding, the *Moye I* court eliminated the well-established requirement that a privileged document was a direct part of the deliberative process in that it makes recommendations or express opinions on legal or policy matters.

Second, the *Moye I* court erred when it applied an improper "process" based analysis that considered the documents in the broad general context of Amtrak's audit process. The "process" based analysis does not specifically analyze whether *each document* withheld by Amtrak is, in fact, deliberative and predecisional.

Third, the *Moye I* court erred when it improperly allowed Amtrak to change its case on appeal. At trial, Amtrak claimed that the deliberative process at issue was Amtrak auditor Gary Glowacki's decision whether to issue a final audit report. App., *infra*, at 60a. Amtrak's evidence focused on Mr. Glowacki's process of deciding whether to issue a final audit report. App., *infra*, at 58a. Moye O'Brien cross-examined Amtrak regarding Mr. Glowacki's deliberative process and, based on the evidence at trial, the district court concluded that Amtrak failed to prove its case.

In the circuit court, Amtrak recast its case and claimed that the deliberative process at issue was Amtrak's audit process rather than Mr. Glowacki's decision whether to issue a final audit report. *See* App., *infra*, at 26a. The Eleventh Circuit reversed the district court and directed a judgment in favor of Amtrak based on Amtrak's newly asserted deliberative process. It did so even though Moye O'Brien did not get to test this claim at trial and the district court did not consider the claim at trial.

On August 4, 2004, Moye O'Brien filed a Petition for Rehearing *En Banc* and sought further review of *Moye I*. The Eleventh Circuit denied Moye' O'Brien's subsequent Petition for Rehearing *En Banc* on September 14, 2004.

"Moye II" — Exemption (b)(5) and the Anchor Bolt Documents

On September 8 and 9, 2003, the district court held a bench trial to determine Amtrak's claim that the deliberative process privilege, *inter alia*, exempted documents responsive to the anchor bolt requests from the FOIA. Based upon the evidence at trial and an *in camera* review of the withheld records, the district court, in an order dated October 22, 2003, rejected Amtrak's deliberative process privilege claim. The district court found that Amtrak failed to prove the existence of its claimed deliberative process and that the documents it sought to withhold were predecisional and deliberative. App., *infra*, at 35a-39a.

Amtrak appealed the district court's October 22, 2003 order to the United States Court of Appeals for the Eleventh Circuit. In an opinion dated September 4, 2004, the Eleventh Circuit reversed the district court's October 22, 2003 order and remanded the case for further proceedings consistent with *Moye I*. In reversing the district court, *Moye II* adopted the faulty analysis of *Moye I*.

REASONS FOR GRANTING THE PETITION

I. The Interpretation Of The FOIA And Its Exemptions Are Matters Of Profound Public Importance.

In a representative democracy, the citizens possess a fundamental right to know "what the Government is up to." *National Archives and Records Admin. v. Favish*, 124 S. Ct. 1570, 1580 (2004). The FOIA enables citizens to learn what the Government is up to by requiring Government agencies to disclose documents in their possession. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). Overbroad interpretations of the FOIA's exemptions prevent citizens from learning what their Government is up to by increasing the amount of information that the Government may withhold. Indirectly then, overbroad interpretations of the FOIA are harmful to our representative democracy and are, necessarily, matters of profound public importance that should be reviewed by this Court. In this case, the need for certiorari review is paramount because the Eleventh Circuit's interpretations of the deliberative process privilege in *Moye I* and *Moye II* are so overbroad that the privilege effectively eviscerates the FOIA.

II. The Court Interprets FOIA's Exemptions Narrowly To Preserve The FOIA's Obligation Of Disclosure.

The FOIA enables the governed to become informed by giving them a broad right to inspect and copy the Government's documents. 5 U.S.C. § 552(a)(2). At the same time, the FOIA identifies those limited circumstances when the Government may refuse to disclose requested documents. *See* 5 U.S.C. § 552(b).

Discussing the relationship between the FOIA's disclosure obligation and the FOIA's exemptions, this Court has stated:

> **Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view** . . . Subsection (b) [the FOIA exemptions] is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not 'an easy task to balance opposing interests, but it is not an impossible one either . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, **yet places emphasis on the fullest possible disclosure**.'

E.P.A. v. Mink, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, p. 3.); *see also Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) ("[FOIA's] limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. . . ."); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) ("As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions.").

This Court recognized, long ago, that the "exemptions . . . are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. "Conflicting

claims over . . . documents", like those presented by the instant case, "must be considered" in "the context of the Act's attempt to provide a 'workable formula' that 'balances, and protects all interests'". *Id.* at 80.

This Court's deliberative process privilege jurisprudence has consistently implemented Congress's intent and protected the delicately crafted balance of the FOIA's statutory scheme. This Court has preserved the FOIA's statutory scheme by limiting the scope of the FOIA's exemptions, particularly the deliberative process privilege. *Mink*, 410 U.S. at 87 ("the privilege that has been held to attach to intergovernmental memoranda clearly has finite limits . . ."). In *Mink*, 410 U.S. at 93, this Court recognized that the deliberative process privilege only permits the Government to withhold documents that "are purely advisory and contain no separable, factual information." In *Sears*, 421 U.S. at 148-49, and *Renegotiation Board v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184-85 (1975), the Court recognized that the deliberative process privilege does not protect final opinions, is limited to documents that are predecisional and deliberative, and that the deliberative process privilege analysis is document specific.

The Eleventh Circuit's decisions in *Moye I* and *Moye II* are contrary to this Court's prior decisions and the FOIA's policy of disclosure because they unnecessarily broaden the scope of the deliberative process privilege. Indeed, by adopting the "reasonable nexus" test and applying a "process" based analysis, *Moye I* and *Moye II* have created an overbroad privilege that allows the Government to withhold essentially any document in its possession.

III. This Court's Certiorari Review Is Necessary To Correct The Eleventh Circuit's Erroneous Determination That Documents Having Only A Reasonable Nexus To A Deliberative Process Are Privileged.

The Eleventh Circuit unnecessarily broadened the scope of the deliberative process privilege by holding that documents that have only a "reasonable nexus" to a claimed deliberative process are privileged. App., *infra*, at 28a-29a; *see also* App., *infra*, at 6a-7a. Under the "reasonable nexus" test, documents that are merely peripheral to, or immaterial to, agency decision-making become privileged notwithstanding their insignificance to an agency's deliberative process.

Neither *Sears* nor *Renegotiation Board* considered whether the deliberative process privilege should protect documents that are either peripheral to, or do not play a material role in, a deliberative process. *Sears* and *Renegotiation Board* are silent on the issue because in those cases it was undisputed that **the agency's final decision-makers actually used the withheld documents in their decision-making processes**. Thus, there was no question whether the documents at issue were peripheral or immaterial with regard to the claimed deliberative processes.

Though this Court has not considered the question, some of the circuit courts have. Those courts concluded that documents that are peripheral to agency decision-making or do not play a material role in a claimed deliberative process should not be considered privileged. *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (rejecting application of privilege to "peripheral" documents); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994) (same); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (requiring documents

to be a direct part of the claimed deliberative process). The Fourth Circuit succinctly summarized this limitation on the scope of the privilege when it stated that:

> **The privilege does not protect a document which is merely peripheral to actual policy formulation**; the record must bear on the exercise of policy-oriented judgment. **Material which predates** a decision chronologically, **but did not contribute to that decision, is not predecisional in any meaningful sense.**

Ethyl Corp., 25 F.3d at 1248 (internal quotation marks omitted, emphasis added).

Prior to its decisions in *Moye I* and *Moye II*, the Eleventh Circuit also recognized that the deliberative process privilege does not extend to documents that are peripheral to, or not a material part of, the agency's decision-making process. The Eleventh Circuit expressed its limitation on the privilege's scope slightly differently than the Second and Fourth Circuits. It limited the privilege by requiring the documents at issue to have been a "direct part" of the deliberative process at issue. *Florida House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941, 945 (11th Cir. 1992); *Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1490-91 (11th Cir. 1992).[2]

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2. This Court disapproved parts of *Nadler* relating to Exemption 7. *United States Dep't of Justice v. Landano*, 508 U.S. 165, 170 (1993). This Court expressed no opinion regarding the parts of *Nadler* that address the deliberative process privilege.

The Eleventh Circuit drew its "direct part" test from the D.C. Circuit's seminal deliberative process privilege case, *Vaughn v. Rosen*. *See Florida House of Representatives*, 961 F.2d at 945 (citing *Vaughn v. Rosen*); *Nadler*, 955 F.2d at 1491 (same). In *Vaughn*, 523 F.2d at 1139-1140, the Government claimed that reports prepared by the Bureau of Personnel Management were excepted from FOIA's disclosure requirement because they were records of the agency's deliberative process. Each report included sections that evaluated the subject agency's management performance and sections that made recommendations to the subject agency for improvements or changes. *Id.* at 1140. The Government sought to withhold the evaluative **and** the recommendatory portions of the reports, arguing that: "**the evaluative portions of the reports constitute an integral part of an ongoing, pre-decisional deliberative process** because . . . they play a consultative role by which the agency changes its personnel policies, rules, regulations and standards. . . ." *Id.* at 1143 (emphasis added).

Rejecting the Government's argument, the *Vaughn* court recognized that:

> **It is not enough to assert, in the context of Exemption 5, that a document is used by a decisionmaker in the determination of policy.** Unevaluated factual reports or summaries of past administrative decisions are frequently used by decisionmaker in coming to a determination, and yet it is beyond dispute that such documents would not be exempt from disclosure. **Rather, to come within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.**

Id. at 1143-44 (emphasis added).

In *Moye I* and *Moye II*, the Eleventh Circuit receded from the "direct part" test and improperly broadened the scope of the deliberative process privilege by adopting its "reasonable nexus" test. Instead of concluding that a document is privileged if it is a direct part of deliberative process, the Eleventh Circuit concluded that:

> **[I]n order for the deliberative process privilege to apply, the decision-making process *must bear a reasonable nexus* to the documents sought.**

App., *infra*, at 28a-29a (emphasis added); *see also* App., *infra*, at 6a-7a (adopting *Moye I* analysis).

Under a "reasonable nexus" test, the scope of the deliberative process privilege becomes overlybroad. Documents are now privileged without regard to their contents or roles in the claimed deliberative process. The Government's ability to withhold documents is now only constrained by the Government's ability to articulate a deliberative process and a "reasonable nexus" between that process and a document that it wants to withhold. The tremendous expansion in the volume of materials that are now privileged upsets the balance of FOIA's statutory scheme by creating a statutory exception, the deliberative process privilege, that is so broad that the exception swallows the FOIA whole.

The overbreadth of the privilege under a "reasonable nexus" test comes into sharp focus when the reasonable nexus test and the direct part test are applied to a single set of facts and the different outcomes are compared. Under the "direct part" test, which was applied by the district court at trial, Amtrak's deliberative process privilege claim failed because

Amtrak did not prove that the withheld documents were *actually* part of a deliberative process *in that they make recommendations on legal or policy matters*. App., *infra*, at 68a. The documents themselves belied Amtrak's claim that the documents made recommendations on legal or policy matters.

Under the "reasonable nexus" test applied by the circuit court, however, Amtrak gained the ability to make a *prima facie* case for the privilege by asserting that its entire audit process was a deliberative process and that all of its withheld documents had some role in that deliberative process. *See* App., *infra*, at 25a-28a. Documents suddenly became deliberative regardless of whether they: (1) were actually incorporated any advice or recommendations; (2) were actually created to assist a decision-maker rather than as part of an on-going, routine government process; (3) had any identifiable role in a decision actually made; or (4) actually gave advice or made recommendations.

The overbreadth of the "reasonable nexus" test and the propriety of the narrower "direct part" test also become apparent when the two tests are considered in the light of the policies underlying the FOIA and the deliberative process privilege. Previously, this Court recognized that the purpose of the deliberative process privilege is to prevent injury "to the consultative functions of government . . ." *NLRB*, 421 U.S. at 149. It also observed that the privilege safeguards "the policy of open, frank discussion between subordinate and chief concerning administrative action", *Mink*, 410 U.S. at 87, but that it was not intended "to protect Government secrecy pure and simple. . . ." *Klamuth*, 532 U.S. at 9.

The direct part test safeguards the "consultative functions of government" because it protects documents that are *truly* part of a deliberative process. Moreover, the direct part test provides the courts with a reliable means to sort the truly deliberative documents from the non-privileged documents that the Government is hiding under blanket assertions of the privilege. The reasonable nexus test, however, lends itself to blanket assertions of the privilege by removing any objective factors for courts to consider when evaluating the Government's privilege claim.

Additionally, the direct part test ensures that subordinates can discuss matters with their superiors frankly. The direct part test protects such communications because the direct part test does not compel disclosure of a subordinate's advice or recommendations. Under the direct part test, a subordinate's advice or recommendations will remain privileged if the Government substantiates its privilege claim by proving that the subordinate has an advisory role in a claimed deliberative process and that the document that the Government seeks to withhold *actually* reveals the subordinate's advice. The reasonable nexus test, however, fosters Government secrecy because it fails to distinguish protected advisory communications from unprotected communications.

The Eleventh Circuit's "reasonable nexus" test improperly expands the scope of the deliberative process privilege and is contrary to the policies underlying the FOIA. This Court's certiorari review is necessary to strike down the "reasonable nexus" test and restore the balance of the FOIA's statutory scheme.

IV. This Court's Certiorari Review Is Necessary To Clarify That Courts Should Apply A Document Specific Analysis When Considering Whether Documents Are Protected By The Deliberative Process Privilege.

Sears and *Renegotiation Board* indicate that the deliberative process privilege analysis is document specific. *Sears*, 421 U.S. at 149 ("it is reasonable to construe Exemption 5 to exempt those documents, and only those documents . . ."); *Renegotiation Board*, 421 U.S. at 184-185 ("the issue in this case is whether the Division Reports and the Regional Board Reports fall within Exemption 5 . . ."). Notwithstanding this Court's clear mandate for a document specific test, the Eleventh Circuit erred by adopting a "process" based analysis. *See Moye I*, App., *infra*, at 26a (reversing because the district court did not "view[] the audit process as a whole"); *Moye II*, App., *infra*, at 7a (reversing because the district court did not "view the documents as they relate to the entire deliberative process in which [Amtrak] is engaged").

Under the "process" based analysis applied in *Moye I* and *Moye II*, the Government can improperly withhold any document, regardless of whether the document ***itself*** is predecisional and deliberative, if the document is simply characterized as an "element" of some larger "deliberative process." Characterizing a document as an "element" of a larger "deliberative process" is unjustifiably simple because, under *Moye I* and *Moye II*, the Government only needs to establish a reasonable nexus between the document and the claimed "deliberative process".

The "process" based analysis adopted in *Moye I* and *Moye II* conflicts with the document specific analysis that this Court required in *Sears* and *Renegotiation Board*. It is also contrary to the policies underlying the FOIA because the "process" based analysis broadens the scope of the privilege to such an extent that the privilege now enables the Government to completely avoid its FOIA disclosure obligations. In this regard, the question of whether the deliberative process privilege extends to documents associated with discrete, routine decisions simply because the discrete decisions are characterized as "parts" of a larger "deliberative process" is a matter of profound public importance.

The conflict between this Court's document specific analysis and the Eleventh Circuit's "process" based analysis becomes apparent when the "process" based analysis and the document specific analysis are applied to the facts of *Moye I*. Under this Court's document specific test, which the district court applied, Amtrak's privilege claim failed because the *individual documents* that Amtrak sought to withhold were not, *themselves*, predecisional and deliberative. App., *infra*, at 68a. However, as seen *Moye I*, the circuit court's application of a "process" based analysis allowed Amtrak to transform those non-privileged documents into privileged documents by simply characterizing them as components of a larger "deliberative process". App. *infra*, at 25a-28a. Under the "process" based analysis, all documents, without regard to their particular contents, become deliberative and exempt from FOIA by simply associating them with a claimed deliberative process.

Application of the "process" based analysis in the context of other Government agencies illustrates how the "process"

based analysis creates a deliberative process privilege that will swallow the FOIA. Under the "process" based analysis, any agency can assert that any of its work is part of a "process," and that the "process" is deliberative simply because it involves a series of discretionary choices. An agency can then assert the deliberative process privilege for documents that are only peripherally related to the "process" leaving the scope of the privilege undefined and, perhaps, all encompassing. In the end, any Government agency could apply this "analysis" to any of its work and all documents in the agency's possession become privileged and exempt from the FOIA. The deliberative process privilege could thus become the tool that agencies use to circumvent the FOIA's disclosure obligations and the FOIA would cease to have a purpose.

In *Vaughn*, 523 F.2d at 1145, the court rejected a "process" based analysis similar to that adopted by the Eleventh Circuit. The *Vaughn* court discussed the flaws of a "process" based analysis stating:

> The Government appears to argue that this entire process of management appraisal, evaluation, and recommendations for improvement is a seamless whole, that it **is in its entirety a deliberative process, and that it is this process which the Government seeks to protect** as an ongoing continuous affair. On this view, starting when the Commission's staff initiates a survey of an agency, when it notes down significant facts of its operation, compares these with personnel and other management directives, evaluates what has been observed, until it formulates these evaluations into conclusions which are usually put

as recommendations for improvement to the surveyed agency **all would be a part of a deliberative process. As such it would be protected under Exemption 5; to make any of it subject to disclosure is to do violence to the protection written in Exemption 5.**

We cannot accept this. If we consider this entire continuous ongoing process of management appraisal, beginning with the action of the Commission's staff inquiries through the final recommendations to the subject agency and its final action thereon, **as a deliberative process, then surely we would be interpreting Exemption 5 to protect too much. The phrase "management process" or "personnel improvement process" would swallow up a substantial part of the administrative process, and virtually foreclose all public knowledge regarding the implementation of personnel policies in any given agency. . . .**

* * *

In another respect the proposed Government interpretation seeks to protect too much, i.e., it assumes that the [Government] recommendations, which it seeks to protect as part of continuous deliberative process, eventually always result in final decisions and actions by the surveyed agency which can be made public. After the [Government] transmits its evaluations and recommendations to the agency surveyed, there is no legally enforceable

> obligation on the subject agency to take any action at all. **Those with some knowledge of the daily functioning of the bureaucracy may surmise that an unknown number of these recommendations simply go into the files and rest peacefully there, with no action which the Government here would define as final and subject to disclosure ever being taken at all.**
>
> **Thus, the Government's characterization of this mass of material it seeks to protect as the "deliberative process" would result in a huge mass of material being forever screened from public view because the administrative bureaucracy had never reached a "final" decision on the management matters involved.** The public has an interest in decisions deferred, avoided, or simply not taken for whatever reason, equal to its interest in decisions made, which from their very nature may more easily come to public attention than those never made.
>
> * * *
>
> **Exemption 5 is designed to protect subordinate's advice to superiors, it is designed to protect *a true deliberative process* usually leading up to final decisions. If we construed Exemption 5 as broadly as the Government seeks to do here, we would go a long way toward undercutting the entire Freedom of Information Act.**

Id. at 1145-46 (emphasis added).

Unlike the "process" based analysis, the document specific test maintains the balance of the FOIA's statutory scheme. By requiring the Government to make a showing as to each particular document that it seeks to withhold, the document specific test ensures that the Government has an appropriately limited safe harbor for developing law or policy and that citizens have full access to all other documents.

The Eleventh Circuit's "process" based analysis is an overlybroad construction of the deliberative process privilege that upsets the balance of the FOIA's statutory scheme. This Court should protect the balance of the FOIA's statutory scheme by granting the Petition and exercising its authority to reverse the Eleventh Circuit's erroneous "process" based analysis.

V. The Eleventh Circuit's Decision To Allow Amtrak To Argue A Previously Unasserted Deliberative "Process" Was Such A Serious Departure From The Accepted And Usual Course Of Judicial Proceedings That This Court Should Exercise Its Supervisory Power.

In *Moye I*, the district court found, based on the evidence presented at trial, that:

> **The only deliberative process that Amtrak relies upon is the process by which Glowacki makes a decision whether to issue a final audit report.**

App., *infra* at 60a (emphasis added).

On appeal, Amtrak cast aside Mr. Glowacki's deliberative process in favor of a new, previously unasserted deliberative process — Amtrak's entire audit "process." App., *infra*, at 26a. The *Moye I* court inexplicably allowed Amtrak to recast its case on appeal. *See Id.*

The *Moye I* court erred when it considered an argument not previously presented to the district court. The law of this Court is clear — the Court will not consider an argument that was not previously presented to the lower courts. *Sims v. Apfel*, 530 U.S. 103, 108-09 (2000). The *Sims* court explained the rationale for this rule stating:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; **it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.**

Id. (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) (emphasis added).

The harm identified by *Sims* occurred in the instant case. In *Moye I*, the Eleventh Circuit determined that Amtrak was entitled to judgment in its favor based upon its new theory of the case and reversed and remanded the proceeding with

judgment for Amtrak. It did so even though Moye O'Brien had not been given an opportunity to test Amtrak's evidence in support of its new theory. By reversing and remanding, the Eleventh Circuit denied Moye O'Brien due process.

The circuit court apparently relied on *Sears*, 421 U.S. at 151-52 n.18, as its authority for allowing Amtrak to recast its deliberative process on appeal. App., *infra* at 25a-26a. Citing *Sears* for the proposition that (1) the government does not have to identify a specific decision; and that (2) the deliberative processes that are privileged may include when "Agencies are . . . engaged in a continuing process of examining their policies. . . .", *id.* (citing *Sears*, 421 U.S. at n.18), the Eleventh Circuit simply concluded that the district court erred by not viewing Amtrak's "entire auditing process as a whole", App., *infra*, at 26a.

The circuit court's justification for permitting Amtrak to recast its case fails because *Sears* is wholly inapposite to this case. *Sears* does not apply because Amtrak identified a decision at trial (Mr. Glowacki's decision whether to issue a final audit report) and *disclaimed* the involvement of any policies. Thus, this is not a case were Amtrak was claiming a decision in a "continuing process of examining policies . . ."

Allowing Amtrak to change its case on appeal and then directing judgment in Amtrak's favor based upon the new theory without providing Moye O'Brien a chance to test Amtrak's evidence was such a serious departure form the accepted and usual course of proceedings that this Court should grant this Petition and exercise its supervisory power.

CONCLUSION

The Court should grant Moye O'Brien's Petition for Writ of Certiorari and review *Moye I* and *Moye II*.

Respectfully submitted,

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